IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1916 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE R.P.DHOLAKIA

HONOURABLE MR.JUSTICE KS JHAVERI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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KUNVARBEN W/O.GOGHABHAI SADURBHAI NAGWADIYA -Appellant(s)

Versus

THE STATE OF GUJARAT - Opponent(s)

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Appearance :
MR PRAVIN GONDALIYA for Appellant(s) : 1,
MR KP RAVAL APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE R.P.DHOLAKIA

and

HONOURABLE MR.JUSTICE KS JHAVERI

Date : 12/09/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE R.P.DHOLAKIA)

1. This appeal under Section 374 of the Code of Criminal Procedure has been preferred by the present appellant-original accused no.1 being aggrieved and dissatisfied by the judgment and order of conviction dated 08.09.2006 passed by the learned Presiding Officer, Fast Track Judge No.4, Morbi in Sessions Case No.65 of 2005 whereby she was sentenced to undergo rigorous imprisonment for life and to pay fine of Rs.1,000/-, in default, to undergo one month S.I. for the charge under Section 302 of the Indian Penal Code, three years rigorous imprisonment and to pay fine of Rs.200/-, in default, to undergo seven days S.I. for the offence under Section 498(A) of the Indian Penal Code, one year rigorous imprisonment and to pay fine of Rs.200/-, in default, to undergo seven days S.I. for the offence under Section 323 of the Indian Penal Code, seven years rigorous imprisonment and to pay fine of Rs.750/-, in default, to undergo one month S.I. for the offence under Section 315 of the Indian Penal Code and seven years rigorous imprisonment and to pay fine of Rs.750/-, in default, to undergo one month S.I. for the offence

under Section 316 of the Indian Penal Code. However, the original accused no.2, Sanjaybhai Dhodhabhai Nagavadi (husband of the deceased) was acquitted of the charges leveled against him.

2. The complaint has been lodged against the present appellant i.e. original accused no.1 and original accused no.2 by the complainant (deceased), Nitaben w/o. Sanjay Dhodhabhai Naganvadia with Morbi City Police Station on 13.08.2005 for the offence under Section 323, 307 and 498(A) of the Indian Penal Code alleging inter alia that on the day of incident at about 3:50 p.m., she was sleeping in the house, her husband was away in his shop and her daughter was playing outside the house.

2.1 At that time, her mother-in-law i.e. the present appellant came with a plastic pipe and assaulted her by telling that she does not want to keep her and wants to get her divorced. She thereafter took kerosene tin and sprinkled on the complainant and ignited a match stick on her and ran away from the place of offence. The complainant shouted for help and, hence, the persons from surrounding, Dansingbhai and Prabhubhai reached there and tried to help her. Thereafter, she was taken to hospital, where she was admitted.

2.2 In the hospital, she gave history regarding the

incident to the doctor. In pursuance of that, doctor noted down the same on the OPD Case papers at Exh.10, wherein she specifically stated to the doctor that prior to the incident, a quarrel took place with her mother-in-law and husband and, thereafter, the mother-in-law sprinkled the kerosene upon her and ignited a match stick. As a result of that, she received burn injuries and her neighbours took her to the hospital. Since it was a medico-legal case, doctor telephonically informed Morbi City Police Station about the incident.

2.3 In pursuance of that, P.S.O. noted down the same and deputed A.S.I. of Morbi City Police Station, Shri Sahdevsinh Dolubha Zala (P.W.No.4). Mr.Zala went there and recorded the complaint given by her and sent the same to Morbi City Police Station for the purpose of registration of the offence. In pursuance of that, P.S.O. of Morbi City Police Station registered the same as Morbi City Police Station I-C.R.No.188/2005 for the offences under Sections 323, 307 and 498(A) of the Indian Penal Code.

2.4 As her physical condition was not good, he also sent yadi to the Executive Magistrate for the purpose of recording her dying declaration. In pursuance of that, the Executive Magistrate, Shri

Buddhikumar Bhimjibhai Patadiya (P.W.No.3) visited the victim at the hospital. He first verified her physical condition and obtained opinion from the doctor concerned as to her fit state of mind in giving the dying declaration. He also took care to see that at the time of recording the dying declaration, nobody should remain present. He thereafter recorded her dying declaration, Exh.18.

2.5 As her physical condition was deteriorating, she was shifted to Rajkot Civil Hospital, where during the course of treatment, she succumbed to the injuries on 18.05.2005 and, therefore, Maranottar form has been filled up and inquest panchnama has been prepared in the presence of two panchas and also sent the dead body to concerned doctor for the purpose of postmortem. The postmortem was performed by the concerned doctor and gave postmortem report, Exh.16.

2.6 During that period, the Investigating Officer submitted a report for addition of Section 302 of the Indian Penal Code and also investigated further into the matter, prepared the scene of offence panchnama, recorded the statements of various witnesses, arrested the accused persons by preparing panchnama and seized the muddamal. The accused were sent to judicial custody. Muddamal

seized has been sent to FSL and on receiving the FSL report, postmortem report and other documents, same were kept with the investigation file.

2.7 At the end of investigation, the chargesheet came to be submitted before the Court of Learned Learned Judicial Magistrate, First Class, Morbi against both the accused. Since the case registered against the accused was exclusively triable by the Court of Sessions, same was committed to the Court of Sessions and on receiving the same, it has been numbered as Sessions Case No.65/2006 and same has been sent in the Court of Learned Presiding Officer, Fast Track Judge No.4, Morbi. On production of the accused into the Court, the Court below framed the charge against both the accused, wherein they have pleaded not guilty and claimed to be tried.

3. To prove the case against the appellant-accused, the prosecution examined following witnesses i.e. P.W.No.1, Dr.Shaileshbhai Jivrajbhai Patel Exh.7, the Medical Officer, General Hospital, Morbi, who recorded the history given by the deceased, treated her and also advised to take her to Rajkot Hospital, P.W.No.2, Premjibhai Bhurabhai Nariya, Exh.12, the doctor, Civil Hospital, Rajkot, who performed postmortem and also proved the same in

the Court, P.W.No.3, Buddhikumar Bhimjibhai Patadiya, Exh.17, who recorded the dying declaration and proved the same, P.W.No.4 viz., Sahdevsinh Dolubha Zala, A.S.I., Morbi City Police Station at Exh.20, who recorded the complaint (Exh.21) of the complainant, P.W.No.5 viz., Nathalal Karshanbhai Parmar, Exh.22, P.S.O., City Police Station, Morbi, who received the telephonic vardhi from Morbi Hospital and who sent A.S.I. to Hospital, registered the complaint and handed over investigation to concerned Investigating Officer, P.W.No.6, Gitaben Dilipkumar, Exh.25, panch of inquest panchnama, P.W.No.7, Sabirbhai Satarbhai Sipai, Exh.30, the panch of scene of offence, Exh.31 and P.W.No.8, Sushilaben Chanabhai Patel (Investigating Officer). The prosecution also produced 21 documentary evidences during the course of trial.

4. Thereafter, the learned A.P.P. submitted the closing pursis and, therefore, the Learned Presiding Officer, Fast Track Judge No.4 recorded the further statements of the accused under Section 313 of the Criminal Procedure Code, wherein the accused requested to examine two witnesses. Therefore, the Court below recorded the evidence of two witnesses i.e. D.W.No.1, Prabhulal Dhirajlal

Koli, Exh.43 and D.W.No.2, Devrajbhai Bavabhai Koli, Exh.44. In the statements recorded under Section 313 of the Criminal Procedure Code, the accused have specifically stated that they are totally innocent and have been falsely involved into the crime in question. Thereafter, both the sides have submitted their written arguments also.

5. After giving opportunity of hearing to the learned advocates appearing for the respective parties, the Learned Presiding Officer, Fast Track Judge No.4, Morbi convicted the appellant-accused for having committed offence for the charges leveled against her, while original accused no.2 was acquitted of all the charges leveled against him vide judgment and order of conviction and sentence as stated hereinabove.

6. Being aggrieved by the Judgment and Order of conviction and sentence awarded by the trial Court, the appellant-accused has preferred this appeal.

7. When this appeal came up for admission before this Court, before hearing the matter, R & P was called for and on receiving the same, it was made available to even learned counsel appearing for the respective parties.

8. Today, we have heard learned counsel, Mr.P.S. Gondaliya for the appellant-accused and learned

Additional Public Prosecutor, Mr.K.P. Raval for the State. We have been taken through the record and proceedings by both the sides.

9. It is mainly argued by the learned counsel for the appellant that it is a case based on dying declaration. Taking us through all the dying declarations, it is argued that the dying declarations are not trustworthy and are not free from doubt. Looking to the physical condition of the deceased at the time of giving dying declaration, she was not in a position to give dying declaration and, hence, the dying declaration is required to be discarded. In absence of dying declaration, there are no other evidence to connect the accused with the crime in question and, therefore, it is a fit case, which requires consideration. It is also argued that the present appellant-accused is the mother-in-law who has not contributed anything towards the crime in question. After taking us through the relevant treatment case papers, it is argued that the present case is not falling under Section 307 or 302 of the Indian Penal Code, but falls under Section 306 of the Indian Penal Code. In short, according to him, it is not a case of homicidal death, but is a case of suicidal.

9.1 He has also taken us through the evidence of important witnesses i.e. P.W.No.1, Dr.Shailesh Jivrajbhai Patel, Exh.7, P.W.No.2, Premjibhai Bhurabhai Nariya and P.W.No.3, Buddhikumar Bhimjibhai Patadiya (Executive Magistrate, who recorded her dying declaration) along with the evidence of A.S.I., who went to Hospital and recorded the complaint given by the her and argued that panchas have also not supported the say of the prosecution. Mr.Gondaliya has, therefore, urged that the present appeal deserves to be allowed and the judgment of conviction and sentence as pronounced by the learned trial Judge requires to be set aside.

10. We have gone through the oral as well as the documentary evidence and the reasoned judgment delivered by the Court below shown to us by the learned counsel for the respective parties. The Court below has dealt with the dying declaration in detail in his judgment at paragraph nos.12 and 13. The Court below has also reproduced the relevant evidence to that effect and discussed the evidence of concerned witnesses i.e. P.W.No.1, Dr.Shailesh Jivrajbhai Patel, Exh.7, who has first recorded the oral dying declaration at the time of noting down the history given by her into the case papers at

Exh.10 and nothing has come out in the cross-examination. He has specifically deposed before the Court that she was mentally and physical fit and she herself has given the history of incident.

11. It is to be noted that the doctor is an independent witness, who has recorded the history during the course of his duty and he has nothing to do either with the victim or the accused and, therefore, his evidence has got much more value than any other witnesses.

12. Simultaneously, P.W.No.3, Buddhikumar Bhimjibhai Patadia, Exh.17 has categorically deposed that on 13.08.2005, when he was discharging his duty, he received yadi at Exh.19 from the Morbi City Police Station, wherein it has been categorically mentioned by the concerned officer that as per the the Station Diary Entry No.17/2005 registered at 4:00 on 13.08.2005, Nitaben, wife of Sanjay, aged about 27 years and a resident of Morbi has received burn injuries and has been admitted in the hospital and, therefore, her dying declaration is required to be recorded. On receiving the same, the Executive Magistrate has made endorsement to that effect upon the yadi and, thereafter, went to Civil Hospital, Rajkot, contacted doctor and obtained opinion regarding the physical and mental condition

of the victim for recording the dying declaration. This witness has deposed that after obtaining certificate as well as opinion from the doctor regarding the fit state of mind of the deceased, he recorded the dying declaration, Exh.18 of the deceased in question-answer form after ensuring that nobody remains present to influence the victim. Same has been proved by him.

13. We have also gone through the dying declaration recorded by the doctor and his evidence as well as dying declaration recorded by the Executive Magistrate in a question-answer form, wherein she has specifically alleged against the present appellant-accused in question Nos.6, 9 and 10 that she sprinkled kerosene and ignited her. Not only that, in question no.10, she has categorically stated that she has good relation with her husband i.e. the original accused no.2 and with the neighbours also. Again in question no.11, she has narrated the same against the original accused no.1, Kuvarben. In short, first dying declaration was given before the doctor and the second before the Executive Magistrate.

14. On going through the evidence of P.W.No.3, Executive Magistrate, along with his cross-examination and dying declaration, we believe that

the dying declaration is trustworthy and nothing has come out which shake his evidence. Not only that, while recording the dying declaration, he has taken sufficient care and caution. Even before recording the dying declaration, he has verified the physical and mental condition of the victim. Not only that, prior to that, he has also taken opinion from the doctor, who inturn, has made endorsement to that effect on the dying declaration, Exh.18 and also proved yadi, Exh.19.

15. P.W.No.4, Sahdev Zala, P.S.I., Morbi City Police Station, who has been examined by the prosecution at Exh.20 has proved the FIR at Exh.21 through his evidence. Said complaint can also be said to be a dying declaration. He has also deposed the same in toto and supported the say of the prosecution.

16. In short, the case of the prosecution is based on dying declaration. Here, in all, there are three dying declarations on record and all three dying declarations have been proved by the prosecution by way of above referred witnesses beyond reasonable doubt. We have also verified the same and also believe that all the dying declarations are trustworthy and free from all doubt. We also believe that before recording the dying declaration, sufficient care and caution has been

taken by the concerned Executive Magistrate. Even, doctor has also opined regarding the physical and mental condition. Not only that, even first dying declaration also supports the say of the prosecution and, therefore, Court below has rightly come to a conclusion that before recording the dying declaration or giving history or giving FIR, victim was physically and mentally fit and was able to give answers. Law on this point is very clear that if the dying declaration is trustworthy, reliable and free from all doubt then, Court can rely upon the same and convict the accused only on the basis of dying declaration without going for any corroboration. Keeping in mind all aspects of the matter, the Court below has rightly convicted the accused with the crime in question.

17. It also reflects from the evidence on record that initially, charge has been framed against two accused, but the victim from the very beginning has categorically stated by way of dying declaration that she had good relation with her husband i.e. original accused no.2 and neighbour and, therefore, she has not even involved her husband, but involved only the present appellant-accused, who is mother-in-law, who gave her physical and mental torture.

18. It is required to be noted that the incident took

place in broad day light at about 3:30 p.m. and accused is her mother-in-law and, therefore, question of mis-identification or falsely identifying the appellant-accused may not be arisen at all. It is required to be noted that at the time of incident, she was having two minor children aged below five years and was also carrying pregnancy at the time of incident, which cannot be taken lightly and, therefore, the Court below has rightly convicted the appellant-accused on the basis of evidence on record. We also share the same view.

19. We are not discussing the evidence of each witness in detail in view of the observations made by the Hon'ble Apex Court in the case of **STATE OF KARNATAKA VS. HEMAREDDY** reported in **AIR 1981 SC 1417** which reads as under:-

> ".... This court has observed in Girija Nandini Devi V. Bigendra Nandini Chaudry (1967) 1 SCR 93: (AIR 1976 SC 1124) that it is not the duty of the appellate court when it agrees with the view of the trial Court on the evidence to repeat the narration of the evidence or to reiterate the reasons given by the trial Court expression of general agreement with the reasons given by the Court the decision of which is under appeal, will ordinarily suffice."

20. In view of the above, since there is no substance in any of the arguments advance by the learned counsel for the appellant-accused, this appeal is required to be dismissed.

21. The appeal is dismissed.

(R.P.DHOLAKIA, J.) (K.S.JHAVERI, J.)

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